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THE SUBMISSION OF THE SOVEREIGN: AN EXAMINATION OF THE COMPATIBILITY OF SOVEREIGNTY AND INTERNATIONAL LAW

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I. INTRODUCTION

One of the perennial concerns with international law is that it exists merely as a legal fiction. While there are many considerable problems that plague the coherence of international law and its prospects for success (including questions of enforceability, democracy, and unity), the focus of this paper is narrower. Specifically, the primary inquiry of this paper is whether the notion of sovereignty is compatible with the limitations imposed by treaties and international laws. At the core of this issue is the apparent paradox of freedom. This paradox is illustrated by the question of whether an entity can maintain freedom and simultaneously retain the ability to become bound. On the one hand, if an entity becomes bound, through submission to treaties for example, it suffers a loss of freedom. On the other hand, if an entity is prohibited from becoming so bound, this prohibition also functions as an impediment to freedom. In this paper, I examine these questions in the context of the sovereign state vis-à-vis international laws and treaties, and recommend a potential reconciliation to the paradox. This reconciliation lies in a simple reformulation of the concepts of autonomy and sovereignty, relying on the connection drawn between the two by Timothy Endicott. This reformulation consists of the recognition that the truest manifestations of autonomy and sovereignty include the possibility of the abdication of that power. In line with the thinking of Immanuel Kant, true freedom, and the fullest expression of sovereignty, is contained within the ability to self-legislate, and to accept and remain subject to limitation.

Having suggested a potential answer to the problem, I briefly survey contemporary international law through the lens of the International Court of Justice and its operations, to see if it comports with the solution articulated herein. The question will then be raised as to whether a sovereign state, having bound itself through submission to either international law or to the terms of a treaty, can step outside of the bounds of its obligation and engage in a kind of civil disobedience on the international stage, while simultaneously remaining sovereign. With the foregoing in place, I conclude with an examination of what it means for a

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sovereign state to truly become bound. This will aid in determining the precise extent to which a sovereign may bind itself, and correspondingly, just how free a sovereign state is.

II. THE PARADOX

In order to explore the paradox of freedom, Jean L. Cohen articulates a useful definition of sovereignty:

> It. . .has an internal and external dimension. Internally, sovereignty involves supremacy: a claim to unified comprehensive, supreme, exclusive, and direct authority within a territory over its inhabitants construed as members of a polity. The correlative external dimension involves a claim to autonomy from outside powers. External sovereignty entails independence and impermeability of the territorial state to jurisdictional claims or political control by foreign authorities.[1]

Sovereignty thus carries with it requirements relating to both the domestic and the foreign. In this paper I will focus on an examination of sovereignty in the external, foreign context.

In framing the paradox to which this paper responds, Timothy Endicott writes: "[t]o be free is not to be bound. In a sense, then, a state is not free if it is bound by treaties. Yet a state would be constrained by a severe disability if it lacked the capacity to pursue its purposes by entering into treaties."[2] The paradox of freedom for the sovereign is whether the sovereign is so mighty as to be incapable of becoming bound, or so mighty as to be able to bind itself completely.[3] To avoid the appearance of a false dilemma, utter inalienability and complete capitulation are not the only two options argued for by legal philosophers. Endicott draws an excellent parallel between the autonomous individual and the sovereign state, in an effort to more effectively understand and engage the

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1. JEAN L. COHEN, SOVEREIGNTY IN THE CONTEXT OF GLOBALIZATION: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM 26-27 (2010), https://mgnyunt.files.wordpress.com/2015/02/globalization-sovereignty.pdf.

2. Timothy Endicott, *The Logic of Freedom and Power*, *in* THE PHIL. OF INT'L LAW 245, 246 (Samantha Besson & John Tasioulas, eds., 2010), https://iuristebi.files.wordpress.com/2011/07/the-philosophy-of-international-law.pdf.

3. *Id.* at 246, note 3 (citing Henry Shue, *Limiting Sovereignty*, *in* 16 HUMANITARIAN INTERVENTION & INT'L REL. (Jennifer M. Welsh, ed., 2003).). Endicott notes that other legal philosophers, and specifically Henry Shue, argue that sovereignty is necessarily limited because sovereignty, as a right, implies duties to other states, and that the principle of non-intervention presents a limitation to all sovereign states. However, this seems to be a practical objection, rather than a conceptual one. Surely, it is possible to envision an international theater in which only one state is sovereign and all others enjoy only limited freedom in deference to the sovereign state. Therefore, the notion of sovereignty does not appear to be threatened by the concerns raised by Shue. The conception of sovereignty advocated herein also allows for limits, but these limits must be voluntarily undertaken. A sovereign is limited by the sovereignty of another state only to the extent that it willingly refrains from imposing upon that state's sovereignty.

problem.[4] This autonomous person analogue demonstrates an effort to carve out a middle ground. John Locke, while having a robust sense of property and self-ownership, argued that this self-governance ended at the threshold of selling oneself into slavery.[5] For Locke, complete forfeiture of autonomy constitutes a violation of autonomy.[6] Therefore, on his view, not only can autonomy be restrained in this way and yet retain its autonomous status, it is *required* that this restraint be placed upon autonomy, lest it violate itself. However, this middle ground is far from uncontested territory. Robert Nozick insists that this ownership of self is absolute, arguing that logical consistency demands a freedom to do with oneself as one pleases, up to and including the complete abdication of autonomy.[7]

In approaching this problem, Endicott draws upon what he views as an inconsistency in the work of John Stuart Mill. He argues that Mill adopts an absolutist approach to human autonomy pursuant to Mill's insistence that harm to others is the only acceptable basis for limiting autonomy.[8] Yet, as Endicott points out, Mill claims that slavery, even when voluntarily entered into, violates this autonomy,[9] seemingly because such would constitute the ultimate relinquishment of autonomy. Mill writes, "by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act."[10] Voluntary abdication of autonomy for Mill, as for Locke, is impermissible.[11] But, Endicott inquires, what of contracts? Concerning Mill's favorable view of the enforceability of contracts,[12] Endicott protests that under such a view, "I am allowed to alienate my freedom to use my car."[13] He continues:

> If we do have liberty to regulate our affairs by mutual agreement, and the regulation to be enforceable against my will, why are we not to have the liberty to regulate our affairs by agreeing that I will be your slave? If

4. *Id.* at 252. Throughout this paper, the hypothetical sovereign state will be treated anthropomorphically in order to retain the analogy between the state and the individual, and to serve as a heuristic for the inner-workings of a state, including its government and its citizens.

5. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 10 (Jonathan Bennett ed., 2008) (1689), http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf.

6. *Id.*

7. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 58 (1974); *see also* J. Philmore, *The Libertarian Case for Slavery*, *in* 14 THE PHILOSOPHICAL FORUM NO. 1, 43, 43 (1982), *available at* http://cog.kent.edu/lib/Philmore1/Philmore1.htm ("[p]eople are only allowed the temporary security afforded by capitalizing a portion of their earning power (i.e., by renting or hiring themselves out for a specified time period), but are denied the freedom of obtaining a maximum of security by selling all of their human capital").

8. Endicott, *supra* note 2, at 247-49; JOHN STUART MILL, ON LIBERTY 13, 69-70, 76 (1859), http://socserv.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf.

9. Endicott, *supra* note 2, at 247-49; MILL, *supra* note 8, at 94-96.

10. MILL, *supra* note 8, at 94-96.

11. *Id.*; LOCKE, *supra* note 5.

12. MILL, *supra* note 8, at 89 ("[i]t is usual and right that the law, when a contract is entered into, should require. . .that certain formalities should be observed. . .in case of subsequent dispute, [that] there may be evidence to prove that the contract was really entered into").

13. Endicott, *supra* note 2, at 248.

> it is freedom to be able to bind myself to deliver my car to the purchaser (with the resultant loss of freedom after I agree), why is it not freedom to be allowed to bind myself to be a slave (with the resultant loss of freedom after I agree)?[14]

As Mill purports to allow for the voluntary surrender of some freedom (as in the forfeiture of the freedom to use some commodity that is sold to another), Endicott wonders what prevents the autonomous individual from surrendering all of that freedom, as in the case of slavery.[15] The prohibition placed on the total abdication of autonomy seems somewhat arbitrary. Endicott suggests that the solution to this paradox lies in the denial of an absolute autonomy.[16] However, Endicott is perhaps too quick to abandon the absolutist conception.

III. RECONCILIATIONS

In his attempts to resolve the paradox of whether a sovereign is so powerful that it cannot bind itself, or so powerful that it can subject itself to any degree of restriction, Endicott writes that "[t]he solutions in the two cases [of state and person] demand an understanding of what it takes for a person to lead a good life, and for a state to be a good state."[17] Endicott's solution is to introduce an additional principle by which to adjudicate between the two prongs of the paradox. He appeals to the good of the state as this guiding principle,[18] and declares that

> State sovereignty is a complex of various forms of power and independence that is complete for the purposes of states. In the case of states, the resolution of the paradox of freedom lies in an identification of those powers and forms of independence. The purposes of states are identical with the purposes that a good state actually pursues. So the content of sovereignty is determined by the powers and forms of independence that a state needs *in order to be a good state*.[19]

However, such a third principle is unnecessary, for one need not look beyond the two options contemplated within the paradox itself for a solution. The paradox arises from the misunderstanding that neither of the two competing options is coherent, and thus that there is need of some third consideration. However, this understanding is incorrect, as a coherent defense *can* be given for one of the two competing conceptions of sovereignty: the conception of sovereignty as the ability to surrender sovereign power. If such a defense is possible, then Endicott's move beyond the paradox by appealing to an additional principle, the good of the state, is an unnecessary one, as the paradox is resolved through a closer examination of sovereignty and the notion of what it means to become bound. Endicott's solution

14. *Id.*
15. *Id.* at 247-49.
16. *Id.* at 252.
17. *Id.* at 247.
18. The "good" here is understood in the normative sense.
19. Endicott, *supra* note 2, at 252.

to the problem perhaps possesses pragmatic utility, in that it can provide guidance as to *which* limitations a state should become bound. But in doing so, his solution abandons the quest to resolve the initial paradox of whether true freedom consists of the ability or the inability to surrender the freedom that makes it sovereign. Therefore, Endicott's "solution" to the paradox of freedom proves to be no solution at all.

Endicott is therefore overly hasty in his desertion of absolute autonomy, and it is this premature rejection that causes him to look beyond the mark while grappling with the problem. The concept of absolute autonomy coheres with the concept of sovereignty far better than a watered down account of freedom. The notion of sovereignty denotes supreme power and authority,[20] a definition saturated with absolutism. Supreme power must be accompanied by absolute autonomy, or it simply fails to be supreme. Something less than this complete autonomy implies some constraint, some impediment to total power, some threat to true sovereignty. The disposal of an absolute conception of autonomy necessitates the disposal of sovereignty itself, as something less than supreme power and authority will be represented by the diminished conception. For this reason, the legal philosopher must be cautious in rejecting absolute autonomy, lest she inadvertently do away with the entirety of the concept of sovereignty. Endicott's arguments must be closely scrutinized in order to determine if the abandonment of absolute autonomy, and, by extension, sovereignty itself, is the only way to escape the paradox. I suggest that it is not.

Rather than a wholesale rejection of absolute autonomy, one must simply bite one of the two bullets of the paradox.[21] In the affirmation of an absolute concept of autonomy, one must accept either that an autonomous individual may become bound to the point of a complete eradication of autonomy, or that the individual is limited from engaging in activities that would be detrimental to her autonomy, which is itself a limit to autonomy. The question, then, is which of these appears to better exemplify autonomy.

A potential answer regarding which bullet to bite lies within the writings of Immanuel Kant. Kant suggests that true autonomy consists of the ability to self-legislate, or of the imposition of bounds upon oneself.[22] It appears then, that Kant accepts the first of the two paradoxical bullets enumerated above: an autonomous individual *is* capable of binding herself out of her autonomy. Kant articulates both a negative and a positive definition of autonomy. His negative definition consists

20. *Sovereignty*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/sovereignty (last visited Mar. 5, 2016).

21. *Bite the Bullet*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/bite%20the%20bullet (last visited Mar. 5, 2016). As used here, to bite one of two bullets is to do one of two unpleasant or painful things because it is necessary, even though one would prefer to avoid doing so.

22. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 45 (Mary Gregor trans., 1997) (1785), http://blog.nus.edu.sg/acerwei/files/2012/12/Kant-Groundwork-ng0pby.pdf.

of being free from alien restraints, free from heteronomy.[23] His positive definition is illustrated by the being who selects her own ends.[24] The counterargument to the position Kant elucidates, and to the position this paper endorses, is that any bounds, even self-selected bounds, are an impediment to autonomy and freedom. However, the response to this objection lies in the fact that all action necessarily binds or limits autonomy. In opting for and pursuing one course, one is no longer free to choose and pursue an alternative course that she might have pursued. She is free to course-correct, but in choosing course *a* at time *x*, and in following up with the actions consistent with that choice, she is no longer free to choose course *b* at time *x*, because she selected course *a* and acted upon that decision. The selection and pursuit of any action necessarily precludes the pursuit of other, incompatible actions. One is often free to change courses later, but in choosing and following through with some action, an agent loses out on other courses of action she might have initially pursued. Since it is impossible to completely refrain from action, all autonomous creatures are constantly acting.[25] All creatures are thus at any given moment either acting under alien influence, or acting under their own will. If the above objection (that any bounds, even those that are self-selected, hinder autonomy) is a valid objection, it would follow that no creature could possibly be autonomous, as all creatures, through making decisions and taking action, are constantly precluding other routes they might have taken, and are thus constantly imposing bounds upon themselves. Therefore, if a coherent understanding of autonomy is to be retained, partial forfeiture of autonomy by an autonomous choice must be possible. Without this understanding, autonomy is impossible, as all agents are constantly forfeiting partial autonomy by acting, thereby precluding other actions. And if partial forfeiture of autonomy is compatible with autonomy, so too is complete forfeiture, absent a compelling limiting principle. Endicott, Mill, and Locke fail to provide such a limiting principle. It is in this sense then that autonomy is absolute: it allows such a robust and radical self-ownership that even its complete abdication is possible.[26] In spite of his opposition to the absolute notion of autonomy, Endicott beautifully describes how this radical conception would look were he to affirm it: "the choice to pursue a course that will deprive me of all freedom—leaving me a hostage, a prisoner for life, a slave. . .can be a true expression of my own independence and autonomyFalse Then, it would be vicious to interfere with my freedom to sacrifice my freedom."[27] Far from limiting autonomy, the ability to exercise autonomy until its own obliteration constitutes a

23. *Id.* at 50.

24. *Id.* at 45.

25. The instance of the comatose patient, and other situations in which an individual is incapable of action or intention, are admittedly instances of a person who is not an autonomous agent, and are thus precluded from this discussion.

26. *See* MILL, *supra* note 8, at 13. This is not to say however, that there are not other principles that might serve to limit autonomy. John Stuart Mill's harm principle, which limits autonomy when it threatens others, might be one such example.

27. Endicott, *supra* note 2, at 250.

full consummation of freedom. This is perhaps what Endicott is onto when he writes: "[b]eing bound. . .is an aspect of a normative ordering of our lives that enhances my autonomy. My life is more my own to live, because of my ability to bind myself to perform agreements."[28]

The absolutist view then takes on a reconstructed form, as an understanding of autonomy as a condition absolutely free of any and all limitation is incoherent. This reformulation is reminiscent of the move made to defend the omnipotence of God. The paradigmatic charge against God's omnipotence was that it was a logical inconsistency to say that His omnipotence meant that He possessed the power to bring about "any state of affairs whatsoever."[29] Examples of the problems with such an understanding include the charges that God would be unable to create a rock so large that He could not lift it, and that He would be unable to alter the necessary truths of logic and mathematics. In response, omnipotence was not done away with, but merely reformulated. A common contemporary interpretation of this trait is that it refers to "maximal power," or that a being is omnipotent "provided that its overall power is not possibly exceeded by any [other] being."[30] With this re-defining of the term, the notion of God as omnipotent remains intact.[31] A similar move is proposed here with the notion of autonomy. To say that autonomy means freedom to do any and all things, but simultaneously that autonomous acts cannot lead to a reduction in autonomy, is not logically coherent. Therefore, a differing conception is requisite, if the term is to survive. As I have suggested, this reconceptualization consists of autonomy as radical self-ownership, such that any and all actions may be engaged in, up to and including the complete forfeiture of autonomy itself.

IV. APPLICATION TO THE SOVEREIGN

The previous section was devoted to a rejection of Endicott's non-absolutist concept of sovereignty, and to exploring personal autonomy in light of the connection Endicott made between autonomy and sovereignty. Emerging from the question of autonomy, the task is now to see whether the parameters of autonomy translate into guiding principles for state sovereignty. I have explored a robust conception of autonomy, and suggested that it overcomes the logical tension Endicott elucidated. The same tension exists for sovereignty, and I suggest that it is resolved in the same way. Sovereignty also appears threatened by the possibility of a diminished power of self-governance.[32] However, that is because the concept of sovereignty, as that which is absolutely free from any kind of limitation, is incoherent. A reformulation of sovereignty, one that recognizes that its fullest expression lies in the possibility of its permanent renunciation, breathes fresh life

28. *Id.* at 248.

29. Joshua Hoffman & Gary Rosenkrantz, *Omnipotence*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 12, 2012), *available at* http://plato.stanford.edu/entries/omnipotence/#2.

30. *Id.*

31. *See id.*

32. Endicott, *supra* note 2.

into the concept, and allows for an intelligible discussion of sovereignty and its limits.

Kant's view of self-legislation as the ultimate exemplification of freedom informs the proper conception of the sovereign.[33] As the fullest manifestation of autonomy is the ability to abdicate that very autonomy, so too is sovereignty fully realized in the ability to yield that sovereign power. A concept of sovereignty, like a concept of autonomy, which espouses the view that the presence of any constraint is incompatible with that power, is itself nonsensical. States, like individuals, engage in actions. As discussed above, actions necessarily preclude other actions, and therefore, by acting, a state limits what it is free to do. A notion of sovereignty that calls for an absolute bar to any and all limits is unintelligible, and is therefore to be rejected. Sovereignty, properly understood as allowing, and in fact requiring, the ability to surrender either some or all sovereign power, is a concept that is plausible in the international theater.

However, these limits, acceptable under this understanding of sovereignty, must be self-imposed limits. Heteronomy, or resultant action caused due to influences external to the individual or state, is incompatible with and antithetical to autonomy,[34] and, by extension, to sovereignty. Therefore, international law has but one recourse to legitimacy: the voluntary self-binding of each state to the good of the global community.[35] Sovereignty is thus compatible with international law only insofar as nations voluntarily assent to it. Legitimacy is attained only when states willingly bind themselves to each other, and any heteronomous means, compulsory or otherwise, threaten to dismantle this international project. Coercion invalidates the system and undue influence threatens the entirety of the enterprise. Sovereignty only finds its actualization in the ability to *willingly* surrender that power.

V. REFLECTIONS ON THE GROUND

To have legitimate international law, it is not enough for it to be conceptually possible. The practices must mirror the theory. More specifically, articulating a legitimate conception of international law does not automatically legitimize the system currently in place. The system must be consistent with the conception in order for it to achieve the articulated legitimacy. It must then be asked: is this conception of sovereignty reflected in how international law currently operates? Does it reflect how things are on the ground? To answer these questions, an examination of the current international theater is warranted in order to determine whether the stage is set in a manner conducive to the kind of sovereignty contemplated within this paper.

The International Court of Justice (ICJ) may serve as the paradigm and representative for contemporary international law. If there is anywhere to look for

33. KANT, *supra* note 22.
34. *Id.* at 41.
35. *See id.*

answers in this inquiry, it is the United Nations (UN).[36] The ICJ is "principle judicial organ" of the UN, and is thus ideally situated for an examination of the current practices of international law.[37] The ICJ handles two kinds of cases: legal disputes between states that have been submitted to the court by the states (contentious cases) and requests for advisory opinions.[38] In line with the theory of sovereignty articulated above, the ICJ's authority is limited to those states that have consented to its jurisdiction.[39] This comports well with Kant's account of self-legislation.[40] If freedom is realized in acts of voluntary self-binding, and if sovereignty can be preserved in only this way, then this is just the kind of system needed to allow for states to engage in self-legislation, a system without compulsion.[41] Such a system free of coercion is necessary, as such pressure would invalidate the legitimacy of the endeavor.

A state may consent to the authority of the ICJ in three different ways: agreeing to submit a dispute to the ICJ; the triggering of a clause contained within a treaty which grants the ICJ authority to resolve an issue; or through general declarations to be bound to the authority of ICJ in the event of a dispute with a state which has a similar declaration.[42] All three of these methods appear to align with the above elucidation of sovereignty: it consists in the freedom of states to voluntarily bind themselves, and to become subject to the authority of an external entity.

Two cases will serve initially to demonstrate whether the ICJ functions, or at least whether it can function, in a way conducive to state sovereignty with those cases that it entertains. The first example that I consider of the ICJ exercising this authority is *Nicaragua v. Costa Rica*, a contentious case submitted to the ICJ for adjudication.[43] In this case, Costa Rica sought relief from the ICJ on the grounds that Nicaragua had occupied a portion of its territory with its army and had intentionally harmed Costa Rica's rainforests and wetlands in its construction of a canal.[44] The ICJ took on the case only in light of the fact that Costa Rica invoked the American Treaty on Pacific Settlement, which Costa Rica and Nicaragua had both signed and ratified.[45] Article XXXI of the Treaty provides that the ICJ shall

36. *What We Do*, U.N., http://www.un.org/en/sections/what-we-do/index.html (last visited Mar. 5, 2016) (Formed shortly after World War II, the U.N. is an international coalition tasked with "the maintenance of international peace and security.").

37. *The Court*, I.C.J., http://www.icj-cij.org/court/index.php?p1=1 (last visited Dec. 31, 2015).

38. *How the Court Works*, I.C.J., http://www.icj-cij.org/court/index.php?p1=1&p2=6 (last visited Dec. 31, 2015) [hereinafter ICJ].

39. *Id.*

40. KANT, *supra* note 22.

41. *Id.*

42. ICJ, *supra* note 38.

43. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Application Instituting Proceedings (Nov. 18, 2010), http://www.icj-cij.org/docket/files/150/16279.pdf.

44. *Id.*

45. American Treaty on Pacific Settlement ("Pact of Bogota") art. 31, Apr. 30, 1948, 30 U.N.T.S. 449.

have jurisdiction over disputes between the parties to the treaty.[46] The ICJ takes special care to state precisely how it possessed jurisdiction over the case, and this stringent adherence to its limits is conducive to the conception of sovereignty articulated in this paper.[47]

The second example is that of *Australia v. Japan*, another contentious case submitted to the ICJ.[48] Australia brought this action against Japan claiming that Japan's whaling practices constituted a breach of the International Convention for the Regulation of Whaling.[49] The ICJ accepted jurisdiction over the matter due to declarations made by the parties that the ICJ should have jurisdiction should such a dispute arise, Australia having made its declaration on March 22, 2002, and Japan having made its declaration on July 9, 2007.[50] That the ICJ's acceptance of this case was contingent upon the declarations made by the states involved again demonstrates a commitment on the part of the ICJ to accept jurisdiction only over states that have agreed to such.[51]

But perhaps even more important than those cases the ICJ entertains are the cases it does not entertain. Whether the ICJ does in fact limit its jurisdiction to those cases over which it gains jurisdiction through one of the three methods described above is perhaps the truest test of its respect for, and deference to, state sovereignty. Whether the ICJ actually declines to hear any cases is one way this can be demonstrated. One such case is that of *Yugoslavia v. United States of America*.[52] This case arose when Yugoslavia instituted proceedings against the United States, alleging that the United States had violated its obligation not to use force against Yugoslavia by bombing Yugoslav territory.[53] Yugoslavia argued that jurisdiction was proper pursuant to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide,[54] to which both Yugoslavia and the United States were parties.[55] The convention provided that disputes between the parties to the convention regarding the "interpretation, application or fulfillment" of the convention were to be submitted to the ICJ.[56] The court did not dispute the

46. *Id.*

47. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Application Instituting Proceedings (Nov. 18, 2010), http://www.icj-cij.org/docket/files/150/16279.pdf.

48. Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Application Instituting Proceedings (May 31, 2009), http://www.icj-cij.org/docket/files/148/15951.pdf.

49. *See* International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72.

50. Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Application Instituting Proceedings (May 31, 2009), http://www.icj-cij.org/docket/files/148/15951.pdf.

51. *Id.*

52. Legality of Use of Force (Yugoslavia v. U.S.), Application Instituting Proceedings, 1999 I.C.J. (June 2, 1999), http://www.icj-cij.org/docket/files/114/14129.pdf.

53. *Id.*

54. Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

55. Legality of Use of Force (Yugoslavia v. U.S.), Application Instituting Proceedings, 1999 I.C.J. (June 2, 1999), http://www.icj-cij.org/docket/files/114/14129.pdf.

56. Genocide Convention, *supra* note 54, art. IX.

existence of the convention, nor the fact that both countries were parties to that convention, but it pointed out that the United States ratified the convention with a reservation.[57] This reservation provided that, regarding Article IX of the convention, before the United States could be properly made a party to any action under the jurisdiction of the ICJ, its specific consent was required.[58] This reservation was not prohibited by the convention, nor was it objected to by Yugoslavia.[59] The court observed that the United States had not provided its consent, and that it had indicated that it would not do so.[60] Therefore, the court held that it did not have jurisdiction over the case.[61]

This case is an important illustration of the ICJ's refusal to entertain cases over which it does not have jurisdiction, even in the weightiest of circumstances. The court noted that it was "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo" that had preceded this action, and further articulated its concern "with the continuing loss of life and human suffering in all parts of Yugoslavia."[62] In spite of the enormity of the circumstances surrounding the action, the ICJ declined to hear a case over which it did not have jurisdiction. In refusing to hear the case, the court stated that it "does not automatically have jurisdiction over legal disputes between States," and further, that "one of the fundamental principles of [the Court] is that it cannot decide a dispute between States without the consent of those States to its jurisdiction."[63] The rejection of this case is encouraging in terms of the court's determination to adhere to the principles of sovereignty, and its refusal to overstep its bounds. The acceptance of this case might have allowed the court to exert tremendous political influence, and yet it refused, recognizing that it did not have jurisdiction. These cases, when considered together, indicate that the requisite freedom, or at least an encouraging start, is provided by current international law, such that states can recognize and exercise the kind of sovereignty articulated in this paper.

VI. CIVIL DISOBEDIENCE OF THE SOVEREIGN

It therefore appears that the notions of sovereignty and international law are at least conceptually compatible, as the fullest expression of sovereignty requires the ability to willingly abrogate that sovereign power (one example of which would be conformity to international law). It appears further that one of the paradigm examples of the current status international law, the ICJ, comports with this conceptual theory, as the court only exercises its power over those sovereign states

57. Legality of Use of Force (Yugoslavia v. U.S.), Order, 1999 I.C.J. (June 2, 1999), http://www.icj-cij.org/docket/files/114/14129.pdf.

58. *Id.* ¶ 21.

59. *Id.* ¶ 24.

60. *Id.* ¶ 27.

61. *Id.* ¶ 28.

62. *Id.* ¶ 15.

63. Legality of Use of Force (Yugoslavia v. U.S.), Order, 1999 I.C.J., ¶ 19 (June 2, 1999), http://www.icj-cij.org/docket/files/114/14129.pdf.

that voluntary acquiesce to its jurisdiction. But can a state violate an agreement to which it has voluntarily bound itself? Assuming it is for noble and not merely self-serving reasons, can a state engage in a kind of international civil disobedience? Generally, civil disobedience refers to an act of a citizen, rather than a state, in which she disobeys the laws of her nation, in an effort to see the law altered.[64] However, the question is pertinent here, as the subject of consideration is that of becoming bound. May a sovereign state breach a self-imposed bound if it appears that its breach will serve purposes similar to the aims of the citizen who engages in civil disobedience?

Civil disobedience on the domestic scale is perhaps more complicated than this kind of "civil disobedience" might be in an international arena. For the individual defying the laws of her country, one of the central questions that arises is whether the individual is bound by those laws in the first place.[65] It must then be determined where this obligation arises from, be it grounded in the citizen's consent, actions invoking the principle of fairness, or some other source.[66] Only then can the question of civil disobedience itself be engaged. In the international context, with the articulation of sovereignty as something that allows for its own alienation, the question is similar: from what source does an international obligation arise, provided there is such an obligation? If the only valid enactment of international law consists in the voluntary binding of states to each other, then the source of the obligation is obvious: it rests on a clear expression of consent by the sovereign state.[67]

As a preliminary matter, an articulation of civil disobedience is required. Four generally accepted criteria for civil disobedience include: conscientiousness, communication, publicity, and non-violence.[68] Generally, conscientiousness refers to an intentional breach of the law.[69] Communication refers to an explicit attempt both to reject the law then on the books and to call for change.[70] Publicity requires that the disobedience be public, as a violation that went unnoticed would have little chance at changing the law.[71] Finally, civil disobedience generally consists of activity that is non-violent.[72] This concept of civil disobedience must be understood before the question of whether states can engage in an international civil disobedience can be addressed.

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64. Kimberly Brownlee, *Civil Disobedience*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (last updated Dec. 20, 2013), *available at* http://plato.stanford.edu/entries/civil-disobedience/#FeaCivDis [hereinafter *Civil Disobedience*].

65. *Id.*

66. *Id.*

67. In a *moral* context, the notion of consent is somewhat problematic. However, many of these problems arise when consent is claimed to be the basis of *moral* obligation. This question of morality is undoubtedly beyond the scope of this paper. Consent is presented here as the basis for *legal* obligation.

68. *Civil Disobedience*, *supra* note 64.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

As the term "civil disobedience" does not necessarily refer to anything states do (as states do not think and act in the same way individuals do), it is important to understand how this question would even arise for the sovereign in an international context.[73] Just as a citizen engages in civil disobedience when conscientiously, communicatively, publicly, and peacefully violating the law, so too does a state engage in a similar act when it defies international law in this way. The question then is: can a state engage in such an action? Or more specifically, can a state engage in such an action in a manner compatible with its sovereignty? Again, the object of this examination is the state that has voluntarily submitted to the jurisdiction of an external authority, such as the ICJ, and has thus become bound to one of its decrees, or voluntarily become bound to some agreement with another state, or voluntarily become bound in some other way. With this framework, the inquiry is whether a state can violate the bounds to which it has subjected itself, even for reasons perceived to be noble.

The abdication of sovereignty at this point appears less troublesome than the abdication of autonomy, as there are many issues bound up with autonomy that are absent for the issue of sovereignty. As Endicott noted: "[u]nlike a slavery contract, a treaty of confederation could be a legitimate act of sovereignty, even if it terminates a nation's sovereignty. A free state might exercise its sovereignty well for the purposes of a good state, precisely in building a new nation along with other states."[74] The implicit assumption by Endicott is that there is no situation in which slavery would enhance a person's good, in a moral sense. Moreover, civil disobedience itself almost always entails additional moral considerations.[75] The same may be said for any kind of promise. Consider the individual who voluntarily makes the promise that she will not cross a certain chalk line that encircles her, until some event comes to pass (e.g., permission from the promisee, or the passage of a certain amount of time). Is that individual obligated to remain within the chalk parameters until death from hunger or thirst overtakes her? This question comes down to a collision between the values of honesty/integrity and the sanctity of life. However, the aim of this paper is not to adjudicate between these two competing goods, nor is its ambition moral analysis. Rather, the question is one of freedom, and specifically the freedom of the state. While the state, if it were to cease to exist, would not necessarily result in the loss of life, certainly it is possible to craft an example in which a state finds itself having to decide in between honoring an agreement, and the potential for loss of life. Such an example might include the instance in which a state upholds a treaty knowing it will lead to war. But again, in this paper I avoid addressing the question of integrity versus life, and consider the problem descriptively and modally, not normatively. In other words, the question presented here is not what the sovereign state *should* do, but what it *can* do. The articulation of sovereignty adopted herein

73. *Id.*

74. Endicott, *supra* note 2, at 259.

75. These considerations may also take other forms, including legal or procedural concerns.

is that sovereign states have the ability to bind themselves, even to the abdication of sovereignty itself. Therefore, the question is whether a sovereign state, having bound itself in this way, has the *ability* to defy a decree to which it has become bound and yet remain sovereign. Can a sovereign state engage in international civil disobedience by defying bounds it has taken upon itself? With this understanding of sovereignty, the question must be answered in the negative.

If the question were answered in the affirmative, what would this say of the sovereignty of that state? If bounds can be broken any time a state wills it, was the state really bound at all? And if the state lacks the ability to bind itself, what does *this* say of its sovereignty? Even if a state follows the generally accepted criteria for civil disobedience, breaching an obligation conscientiously, communicatively, publicly, and peacefully, and does so for noble reasons, such a breach of a self-imposed bound runs contrary to the conception of sovereignty adopted in this paper. The state which violates a decree to which it is bound, discovers that it was never actually bound, and encounters the startling epiphany than it might be incapable of such self-binding.

VII. TO BE BOUND

To be bound means to become limited, confined, or restricted,[76] with the connotation, in the strongest sense of the term "bound," suggesting that such restriction is inescapable. To be bound, in this sense, has a different connotation than the binding contemplated in contract law, which generally refers to an obligation adhered to under pain of some negative consequence.[77] More clearly stated, the bounds brought on through contractual obligation are binding *only insofar as* a party wishes to avoid the negative consequences associated with the breach of that contract. To become bound to the extent contemplated herein implicates a stronger meaning of the word. The word "bound" can be used to denote any general obligation, but it can also be used to denote a limit.[78] This kind of limit involves an amount of finality, or a threshold that cannot be crossed. It is not, as with contract law, a limit that may be surpassed as long as a party is willing to accept the ramifications of that action.[79] Rather, this kind of limit is akin to an individual confined by bonds, whose movement is thus restricted. For this individual, it is not some monetary penalty or severed business relation which forms the boundary of possible action, but the constraints placed upon her. In this example, the constraints are physical, and may consist of handcuffs, chains, rope, or some other physical impediment. The constraint called for in the case of the sovereign is less tangible, but no less real. It consists of the power of the sovereign state to constrain itself through its will. The truly sovereign state will possess the

76. *Bound*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/bound (last visited Mar. 5, 2016) [hereinafter *Bound*].

77. *Contract*, BLACK'S LAW DICTIONARY (10th ed., 2014) [hereinafter BLACK'S LAW DICTIONARY].

78. *Bound*, *supra* note 76.

79. BLACK'S LAW DICTIONARY, *supra* note 77.

requisite control over itself to become bound in the same way the captive is bound: it is not simply obligated to refrain from some action; rather, a truly sovereign state *will not* engage in that action. In a sense, the sovereign state *cannot* violate such bounds, for it will then cease to be sovereign in the robust sense understood herein. For the purposes of this paper, "cannot" and "will not" amount to the same result: a bar to action. In the case of the captive, this inaction is involuntary. For the sovereign state, it is necessarily voluntary.

If a state ostensibly claims to bind itself, but later rescinds its agreements, then there was an escape from the professed binding, and thus the state was never truly bound at all, having possessed the same means of escaping its obligations from the moment those obligations were incurred. If the captive is placed in bonds, and, upon her first attempt to escape, discovers that the ropes placed around her arms were never tied, it turns out she was not bound, and that she is free to flee. To adopt a weaker understanding of what it is to be bound is to weaken the conception of sovereignty, as to do so would suggest that sovereign states are not the kinds of things capable of binding themselves in this strongest sense.[80] The state that willingly breaks these types of covenants discovers it lacks the ability to truly bind itself, or at the very least, that it failed to bind itself on that occasion. Such a failure is illustrative of a state's *inability* to bind itself, or, of a state's inability to bind itself every time it purports to do so. That state therefore reveals that it does not truly have the power ascribed to a sovereign. Consider the state that enters into a treaty with another state, but which later violates the terms of that treaty. With this violation comes the revelation that the restraint on the part of the violating party was only a product of what the state deemed best or convenient at the time the treaty was entered into. If the state violates its own agreements every time such a violation is beneficial, then the state demonstrates an inability to bind itself beyond its own passing whims. Thus it illustrates the low grade of its sovereignty, as it lacks the power to bind itself beyond the shifting sands of its own interests and concerns.

Therefore, the question of whether a truly sovereign state can violate decrees to which it has bound itself is answered in the negative. A *sovereign* state binds itself beyond repudiation. Only a state of lesser caliber can coherently violate that to which it has bound itself. Civil disobedience on an international scale is thus incompatible with sovereignty.

What then does this mean for an international rostrum in which many of the main actors can be said to have violated their agreements? Is it the case that, under this conception, sovereignty is relegated to the theoretical? Sovereignty is viable

80. The obvious difficulty with this understanding of being bound is that it cannot become true, or at least, cannot be proven to be true, until the time for which the state has agreed to be bound has passed. However, this epistemological limitation does not alter the reality that the state which violates its agreements *will* be known to have failed in its endeavors to bind itself, and thus to have failed to exercise true sovereign power. Perhaps this limitation simply means that there can only be a presumption in favor of a state's sovereignty until it commits a breach of this kind.

on a practical level, but whether it is present will depend on a case-by-case analysis. As the demarcation between colors on a color spectrum is blurred, so too may be the line that separates the sovereign from the subjugated. It may simply be that no case fits neatly within either of these conceptual expressions, but that each merely falls nearer to one or the other. In the case of sovereignty, the concepts articulated herein merely serve to establish a metric that aids in the understanding of whether a certain state falls nearer to or further from sovereignty.

VIII. CONCLUSION

The successful implementation of international law is a contemporary problem whose elusive solutions have appeared to be particularly fickle. Both conceptual and practical concerns form barriers to its execution. However, in this paper I have endeavored to show that one such conceptual problem, that of the tension between international law and sovereignty, is a problem that dissipates once the concept of sovereignty is reformulated and properly understood. I then surveyed current applications of international law in order to determine whether they comport with this understanding of sovereignty, and whether there is room for this expression of the freedom of the state. In my examination of the ICJ, I determined that its current practices do in fact align with the proper understanding of state sovereignty, and allow for states to exercise their sovereignty. Finally, I explored whether a sovereign state can engage in a kind of international civil disobedience by defying a decree to which it has bound itself. In light of the conceptualization of sovereignty adopted herein, a sovereign state does not have this ability. Only a state with a power less than sovereign may back out of its obligations, as a truly sovereign state has the ability to bind itself beyond contravention. The insights of Kant, Endicott, and others reveal sovereignty in its potent and absolute form, and demonstrate the compatibility of sovereignty and international law. The favorable environment of the current international theater exposes the reality that the burden remains on individual states to recognize their own sovereignty, and to act upon that recognition.